P & A Systech Sdn Bhd v YAB Dato' Seri Mahdzir Khalid Menteri Besar Kedah Darul Aman & Anor

HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 21-08 OF 2007
SEE MEE CHUN JC
23 NOVEMBER 2010

Tort — Defamation — Defence — Justification — Not specifically pleaded — Whether must be pleaded specifically — Plea that 'words complained of were true in substance and in fact' — Whether amounted to plea of justification — Whether justification proved

Tort — Defamation — Impugned statements — Published in newspapers and internet — Whether statements amounted to defamation — Whether State Government liable for defamatory statements uttered by third person

The plaintiff herein was suing the first and the second defendants, the then Menteri Besar Kedah Darul Aman and the State Government of Kedah Darul Aman, respectively, for defamation as a result of statements made by the defendants published in newspapers and the internet. In the present case, Syarikat Shahidin had obtained a contract on 26 February 2004 for the following job specification: *'memungut dan membeli kelongsong serta peluru yang telah digunakan dari jenis tembaga, steel dan alloy di persekitaran Pulau Songsong'*. Initially, the said contract was valid for two years but was extended to 25 February 2007. The contract with the Government was executed and implemented through the Ministry of Defence (MINDEF). Syarikat Shahidin in turn entered into a project management agreement (PMA) with the plaintiff on 9 June 2005. The plaintiff, as the project management company, was to recover the items as described above in the vicinity of Pulau Songsong. Pursuant to the PMA, the plaintiff entered the waters of Pulau Songsong and commenced works. The plaintiff had obtained the approval from the State vide letter dated 28 June 2006 for *'pengeluaran sisa-sisa kerja (waste) termasuk pasir, tanah, selut, batu karang, kulit-kulit siput dan lain-lain di dasar laut Pulau Songsong'*. The air force through its Operations Department and Procurement of Materials Section had no objection to the extraction of waste (*pengeluaran sisa-sisa*). Controversies arose as to the conduct of the plaintiff in performing the work, following which, allegations were made by Datuk Nawawi Ahmad, the State Environment Committee Chairman, and by Dato Seri Mahdzir Khalid, the then Menteri Besar of Kedah, that the plaintiff had used the contract as a facade to illegally carry out sand dredging activities in the area. Prior to or while undertaking the work, the plaintiff had executed an agreement

with one Marinecore Sdn Bhd in which the plaintiff agreed to supply marine sands to them. Notwithstanding the above fact, the plaintiff averred that the statements by Datuk Nawawi and Dato' Mahdzir had defamed them, and in the circumstances filed a suit against Dato' Mahdzir and the State Government of Kedah claiming, inter alia, damages. The defendants relied on the defence of justification arguing that the 'the words complained of were true in substance and in fact'. The issues for the determination of this court were as follows: (i) whether the impugned statements were defamatory of the plaintiff; (ii) whether the second defendant could be held liable for the statements made by Datuk Nawawi; and (iii) whether the defendants could rely on the defence of justification, and if so, whether the defendants have proven that their statements.

Held, dismissing the plaintiff's claim with costs and dismissing the defendents' counterclaim:

(1) As the impugned statements were made by Datuk Nawawi Ahmad, he ought to have been sued as a defendant. As Datuk Nawawi Ahmad was not joined as a defendant in this action for the statements attributed to him, the State Government could not be liable for the alleged defamation statements (see paras 3 & 5).

(2) The word 'illegal', used to describe the sand dredging activities in the *Star* and *Star Online*, as well as *'tidak pernah memberikan kebenaran kepada syarikat itu untuk menyedut pasir'* in *Utusan Malaysia Online* in reference to plaintiff, impute a lack of integrity in that the plaintiff was conducting its activities in disregard of the law. The statement *'mereka bukan sahaja mengeluarkan kelongsong peluru yang jatuh kedalam laut tetapi turut menyedut dan menjual pasir sekitar pulau berkenaan'* imputed the plaintiff to be stealing sand and hence, lacking integrity and honour. This court finds that the above statements did in law amount to defamation (see para 14).

(3) Although the defendants had not specifically pleaded justification, nevertheless the defendants did state that approval was only for the removal of ammunition and not for sand dredging. The above fact constituted the defence of justification, although it was not specifically pleaded. This was because if the defendants could prove so, it would mean that the three statements in question were substantially true and therefore, the essence of justification. Further, in para 12 of its statement of defence, the defendants had stated that the statements made were true. Hence, the defendants could rely on the defence of justification (see paras 16–18).

(4) The inference to be drawn was that the plaintiff was on the island for the specified purpose of removal of waste materials. Further inference was that the plaintiff was dredging sand as well as removing ammunition

shells. This was evident from the Agreement it had entered into on 20 December 2006 with Marinecore Sdn Bhd. The scope of work included the supply by the plaintiff of approved marine sand. It was stated in the recital thereof that the plaintiff had been given the right to extract sand or in the possession of a sand source area located at Pulau Songsong. This would mean that the plaintiff needed sand for the purpose of supply to Marinecore. This made it probable because the plaintiff was already dredging sand. In the light of the above, the defendants had proven their statements to be true and thus, had established justification (see paras 28–29).

[Bahasa Malaysia summary

Plaintif di sini menyaman defendan-defendan pertama dan kedua, Menteri Besar Kedah Darul Aman pada masa itu dan Kerajaan Negeri Kedah Darul Aman, bagi fitnah kerana kenyataan yang dibuat oleh defendan-defendan diterbitkan di dalam surat khabar dan internet. Di dalam kes ini, Syarikat Shahidin telah memperoleh kontrak pada 26 Februari bagi spesifikasi kerja berikut: *'memungut dan membeli kelongsong serta peluru yang telah digunakan dari jenis tembaga, steel dan alloy di persekitaran Pulau Songsong'*. Pada peringkat awal, kontrak tersebut sah untuk dua tahun tetapi dilanjutkan kepada 25 Februari 2007. Kontrak dengan kerajaan dimeterai dan dilaksanakan melalui Kementerian Pertahanan (MINDEF). Syarikat Shahidin kemudian memasuki perjanjian pengurusan projek (PMA) dengan plaintif pada 9 Jun 2005. Plaintif sebagai syarikat pengurusan projek, bertanggungjawab untuk mendapatkan semula item-item yang dinyatakan di atas di sekitar Pulau Songsong. Berikutan PMA, plaintif memasuki kawasan perairan Pulau Songsong dan memulakan kerja. Plaintif memperoleh kelulusan daripada kerajaan negeri melalui surat bertarikh 28 Jun 2008 untuk *'pengeluaran sisa-sisa kerja (waste) termasuk pasir, tanah, selut, batu karang, kulit-kulit siput dan lain-lain di dasar laut Pulau Songsong'*. Tentera udara melalui *Operations Department and Procurement of Materials Section* tidak membantah pengeluaran sisa-sisa tersebut. Kontroversi berbangkit mengenai tindakan plaintif dalam menjalankan kerja, yang berikutannya, dakwaan dibuat oleh Datuk Nawawi Ahmad, Pengerusi Jawatankuasa Alam Sekitar Negeri, dan oleh Dato Seri Mahdzir Khalid, Menteri Besar Kedah pada masa itu, bahawa plaintif telah menggunakan kontrak tersebut sebagai samaran untuk menjalankan aktiviti mengorek pasir secara haram di kawasan tersebut. Sebelum itu atau semasa menjalankan kerja-kerja tersebut, plaintif telah memeterai perjanjian dengan Marinecore Sdn Bhd di mana plaintif bersetuju membekalkan pasir laut kepada mereka. Walaupun dengan fakta di atas, plaintif menyatakan bahawa kenyataan-kenyataan oleh Datuk Nawawi dan Dato' Mahdzir telah memfitnah mereka, dan dalam keadaan tersebut memfailkan guaman terhadap Dato Mahdzir dan Kerajaan Negeri Kedah menuntut, antara lain, ganti rugi. Defendan-defendan menyandar pada pembelaan justifikasi menghujah bahawa 'the words complained of were true in substance and in fact'. Isu-isu

untuk dipertimbangkan oleh mahkamah adalah seperti berikut: (i) sama ada kenyataan-kenyataan yang dipersoalkan adalah memfitnah plaintif; (ii) sama ada defendan kedua boleh dikatakan bertanggungjawab bagi kenyataan yang dibuat oleh Datuk Nawawi; (iii) sama ada defendan-defendan boleh menyandar pada pembelaan justifikasi, dan jika boleh, sama ada defendan-defendan telah membuktikan kenyataan mereka.

Diputuskan, menolak tuntutan plaintif dengan kos dan menolak tuntutan balas defendan–defendan:

(1) Oleh sebab kenyataan yang dipersoalkan diucapkan oleh Datuk Nawawi Ahmad, dia sepatutnya disaman sebagai defendan. Oleh kerana Datuk Nawawi Ahmad tidak digabungkan sebagai defendan di dalam tindakan ini bagi kenyataan yang dibuatnya, Kerajaan Negeri tidak boleh bertanggungjawab bagi kenyataan memfitnah yang didakwa (lihat perenggan 3–5).

(2) Perkataan 'illegal' yang digunakan untuk menggambarkan aktiviti mengorek pasir di dalam *The Star* dan *Star Online*, dan juga *'tidak pernah memberikan kebenaran kepada syarikat itu untuk menyedut pasir'* di dalam *Utusan Malaysia Online* merujuk kepada plaintif, mengatakan mereka tidak mempunyai integriti di mana plaintif melakukan aktiviti-aktivitinya tanpa mengendahkan undang-undang. Kenyataan *'mereka bukan sahaja mengeluarkan kelongsong peluru yang jatuh ke dalam laut tetapi turut menyedut dan menjual pasir sekitar pulau berkenaan'* menyatakan bahawa plaintif mencuri pasir dan dengan itu tiada integriti dan maruah. Mahkamah ini mendapati bahawa kenyataan di atas, dari segi undang-undang, tidak bermaksud memfitnah (lihat perenggan 14).

(3) Walaupun defendan-defendan tidak secara spesifik memplid justifikasi, walau bagaimanapun defendan-defendan menyatakan kelulusan hanya untuk pengeluaran senjata dan bukan untuk mengorek pasir. Fakta di atas membentuk pembelaan justifikasi, walaupun ia tidak diplid secara spesifik. Ini adalah kerana jika defendan-defendan boleh membuktikannya, ia akan bermaksud bahawa ketiga-tiga kenyataan yang dipersoalkan adalah secara substansial betul dan dengan itu, intipati justifikasi. Selanjutnya, dalam perenggan 12 penyataan pembelaannya, defendan-defendan telah menyatakan bahawa kenyataan-kenyataan yang dibuat adalah betul. Maka defendan-defendan boleh menyandar atas pembelaan justifikasi (lihat perenggan 16–18).

(4) Inferens yang dibuat adalah bahawa plaintif berada di pulau tersebut untuk tujuan tertentu bagi mengeluarkan sisa-sisa. Selanjutnya, inferens adalah bahawa plaintif mengorek pasir dan juga mengeluarkan kelongsong peluru. Ini terbukti daripada perjanjian yang dimasukinya pada 20 Disember 2006 dengan Marinecore Sdn Bhd. Skop kerja termasuk plaintif membekalkan pasir laut yang diluluskan oleh plaintif

tanah laut yang diluluskan. Dinyatakan dalam mukadimahnya bahawa plaintif telah diberikan hak untuk mengeluarkan pasir atau mempunyai milikan kawasan sumber pasir yang terletak di Pulau Songsong. Ini bermaksud bahawa plaintif memerlukan pasir untuk tujuan membekalkan kepada Marinecore. Ini menjadikannya mungkin kerana plaintif telah pun mengorek pasir. Berdasarkan perkara di atas, defendan-defendan telah membuktikan kenyataan mereka sebagi benar dan dengan itu, telah membuktikan justifikasi (lihat perenggan 28–29).]

Notes

For cases on defamation in general, see 12 *Mallal's Digest* (4th Ed 2005 Reissue) paras 259–623.

For cases on defence, see 12 *Mallal's Digest* (4th Ed 2005 Reissue) paras 308-319.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770, CA (refd)

Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371; [1999] 1 CLJ 461, CA (refd)

Kerajaan Malaysia & Ors v Lay Kee Tee & Ors [2009] 1 MLJ 1; [2009] 1 CLJ 663, FC (refd)

S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173; [1988] 1 CLJ (Rep) 233, SC (refd)

Md Radzi bin Mustafa (Radzi & Abdullah) for the plaintiff.
Anas bin Ahmad Zakie (Zahruddin bin Mohammed Isa with him) (State Legal Officer, Attorney General's Chambers) for the defendant.

See Mee Chun JC:

[1] The plaintiff is suing defendants for defamation as a result of statements made by the defendants published in newspapers and the internet in mid February 2007 and early March 2007. The plaintiff is a company. The first defendant was the then Menteri Besar Kedah Darul Aman while the second defendant is the State Government Kedah Darul Aman.

ALLEGED DEFAMATORY STATEMENTS

[2] The alleged defamatory statements are as set out in paras 5–12 of the statement of claim. Altogether there are eight statements which appeared in *Berita Harian* C6 (16 Februrary 2007, P17), *Sunday Star* N25 and *Star Online* (18 February 2007, P18 and P19), *Utusan Malaysia Online* (28 February 2007, P20), *Harian Metro* (9 March 2007, P21), *Berita Harian Online* (21 February

2007, P22), *Star* N15 (22 February 2007, P23) and *Star Online* (9 March 2007, P24) (all collectively referred to as the statements). The *Utusan Malaysia* statement dated 14 March 2007 referred to in para 1(e) of issues to be tried (bundle E) was not pleaded.

STATEMENTS OF DATUK NAWAWI AHMAD

[3] Three statements in *Star* (22 March 2007, P23), *Star Online* (9 March 2007, P24) and *Harian Metro* (9 March 2007, P21) were made by Datuk Nawawi Ahmad (State Environment Committee Chairman) who has not been sued as a defendant. This obvious fact was agreed by the plaintiff first witness (PW1 Puan Laili bt Ng Mohd Ismail, managing director, plaintiff company).

[4] *Gatley on Libel and Slander* (9th Ed 1998) states at p 173:

> An action for defamation is a purely personal action. The proper person to sue as plaintiff is the person defamed, and the proper person to be sued as defendant is the person who published the defamatory words ….

[5] This means that Datuk Nawawi as the maker of the statements ought to have been sued as defendant. The state government cannot be liable for those statements. *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1; [2009] 1 CLJ 663 is resoundingly clear on this when at p 14 (MLJ); p 678 (CLJ) the Federal Court said:

> In the present case, all the eight causes of actions are actions in tort or tort based premised on the act or omission of an individual. None of the governments sued is capable of committing the wrong pleaded. Since the governments' liability in tort can only be vicarious by virtue of ss 5 and 6 of Act 359 and as the officers who were responsible for the alleged wrongdoing were not joined as defendants to the action, it is therefore not possible to maintain a successful claim in tort against the government as primary tortfeasors.

[6] As Datuk Nawawi was not joined as defendant in this action for the statements attributed to him and the state government is not capable of the alleged defamation there is no case as far as those three statements are concerned.

STATEMENTS BY DATO' SERI MAHDZIR KHALID

[7] Turning now to the remaining five statements they were made by Dato Seri Mahdzir Khalid. Out of these five statements one statement (P22-*Berita*

Harian Online 21 February 2007) was admitted by PW1 herself in cross-examination to be not defamatory. Refer to p 14 of court recording transcription system:

> S: P22. Baca keratan surat khabar ini, muka surat 27 dan 28. Saya cadangkan Puan Laili, tidak ada apa-apa fitnah yang dikeluarkan melalui keterangan kenyataan yang dibuat. Setuju ataupun tidak setuju?
>
> J: Yang ini saya setuju.

[8] She was not re examined on her admission and as such I would have to accept her evidence as an admission of no defamation. The Court of Appeal case of *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 at p 794 had this to say:

> … It is essential that a party's case be expressly put to his opponent's material witness when they are under cross examination. A failure in this respect may be treated as an abandonment of the pleaded case … It is quite wrong to think that this rule is confined to the trial of criminal cases. It applies with equal force in the trial of civil cases.

If the plaintiff's own witness says there is no defamation there is no person defamed and hence no case to speak of.

[9] P17 (*Berita Harian* C6 16 February 2007) is the newspaper version of what appeared online in P22 which is admitted to be non-defamatory. Hence there is no defamation.

[10] That only leaves three more statements to be considered. They are reproduced as follows:

> *Sunday Star* (18-2-2007,P18) and *Star Online* (18-2-2007,P19) Kedah Menteri Besar Dato' Seri Mahdzir Khalid confirmed that the dredging activities in Pulau Songsong and its vicinity was illegal.
>
> Utusan Malaysia Online (28-2-2007,P20) Kedah arah henti kegiatan curi pasir
>
> Kerajaan Negeri hari ini mengarahkan sebuah syarikat yang menjalankan operasi mengambil kelongsong peluru di Pulau Songsong Yan dekat di sini menghentikan serta merta aktiviti itu.
>
> Menteri Besar Dato' Seri Mahdzir Khalid berkata arahan itu dikeluarkan kerana perjanjian antara syarikat terbabit P&A Systech Sdn Bhd dengan Kementerian Pertahanan sebelum ini menimbulkan kekeliruan dari segi pengambilan kelongsong peluru dan pengambilan pasir.
>
> Mengikut kelulusan Kementerian Pertahanan katanya syarikat itu dibenarkan mengambil kelongsong peluru yang telah digunakan oleh pesawat tentera semasa mengadakan latihan di sekitar pulau berkenaan.

Masalahnya mereka bukan sahaja mengeluarkan kelongsong peluru yang jatuh kedalam laut tetapi turut menyedut dan menjual pasir sekitar pulau berkenaan. Perjanjian itu nampak sangat mengelirukan.

Menurut beliau kerajaan negeri tidak pernah memberikan kebenaran kepada syarikat itu untuk menyedut pasir di kawasan pulau berkenaan.

These statements will collectively be referred to as the three statements.

WHETHER THE THREE STATEMENTS DEFAMATORY

[11] As to what constitutes defamation I can do no better than to refer to *Gatley* at p 7:

> *What is defamatory*. There is no wholly satisfactory definition of a defamatory imputation. Three formulae have been particularly influential: (1) Would the imputation tend to lower the plaintiff in the estimation of right-thinking members of society generally?; (2) Would the imputation tend to cause others to shun or avoid the plaintiff?; and (3) Would the words tend to expose the plaintiff to hatred, contempt or ridicule?.

[12] Hence in the Court of Appeal case of *Chok Foo Choo @ Chok Kee Lian v The China Press* [1999] 1 MLJ 371; [1999] 1 CLJ 461 the court said at p 374 (MLJ); p 467 (CLJ):

> … the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory.

[13] The plaintiff says that the statements meant and were understood to mean that plaintiff was a *jahat* company carrying on sand dredging activities at Pulau Songsong illegally and without authorisation. The plaintiff goes on to say the statements are defamatory and have caused a great loss of credibility and reputation to it as a legitimate company and business entity (*menyebabkan plaintif sangat cacat kebolehpercayaan dan reputasinya sebagai sebuah syarikat dan entiti perniagaan yang berwibawa*). The statements also lowered plaintiff in the estimation of the public and business community.

[14] The approach taken is to examine the words complained of in the context of the whole article. The word 'illegal' to describe the sand dredging activities in the *Star* and *Star Online* and 'tidak pernah memberikan kebenaran kepada syarikat itu untuk menyedut pasir' in *Utusan Malaysia Online* in reference to plaintiff impute a lack of integrity in that plaintiff was conducting its activities in disregard of the law. The statement 'mereka bukan sahaja mengeluarkan kelongsong peluru yang jatuh ke dalam laut tetapi turut

menyedut dan menjual pasir sekitar pulau berkenaan' impute plaintiff to be stealing sand and hence lacking integrity and honour. I find the three statements amount to defamation.

DEFENCE

[15] *Gatley* says at p 233 that:

> It is a defence for the defendant to establish that the imputation in respect of which he is sued is substantially true and the defence is called a plea of justification.

[16] The plaintiff counsel has submitted that although defendants have denied the claim nowhere is the defence of justification in respect of the defamatory statements pleaded. As parties are bound by their pleadings it is submitted that defendants can only rely on the absence of a contract between plaintiff and Ministry of Defence and the absence of approval to enter the waters of Pulau Songsong. I would add that defendants have also stated approval was only for removal of ammunition shells but not for sand dredging.

[17] These in fact is the defence of justification although not specifically stated. This is because if defendants can prove so it would mean the three statements are substantially true and that is the essence of justification.

[18] Further in para 12 of its statement of defence defendants have stated the statements made are true. In *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173; [1988] 1 CLJ (Rep) 233 the then Supreme Court remarked at p 177 (MLJ); p 240 (CLJ):

> In the amended statement of defence it was averred that the words complained of were true in substance and in fact. In other words, the appellant pleaded justification.

The defendants can thus rely on justification as their defence.

WHETHER JUSTIFICATION PROVED

[19] The burden lies upon defendants to establish justification. To establish justification defendants must prove that the defamatory imputation is true. Refer to *Pakianathan* at pp 240–241.

[20] Syarikat Shahidin (Shahidin) had obtained a contract 'memungut dan membeli kelongsong serta peluru yang telah digunakan dari jenis tembaga, steel dan alloy di persekitaran Pulau Songsong (P2)'. The contract dated 26 February 2004 was valid for two years from the date of signature. It was

extended from 26 February 2006 to 25 February 2007 (P5). The contract with the government was executed and implemented through Ministry of Defence (MINDEF).

[21] Shahidin in turn entered into a project management agreement (PMA) with plaintiff dated 9 June 2005 (P4). The plaintiff as the project management company was to recover the items as described in the vicinity of Pulau Songsong. Clause 5.1 stated that the PMA shall expire on 25 February 2006 and Shahidin as the contractor 'warrants that it shall secure a further extension of two years upon such advice from the project management company'. PW1 says although the PMA had expired in February 2006 there was an extension.

[22] Pursuant to the PMA plaintiff entered the waters of Pulau Songsong and commenced works. The plaintiff had obtained the approval from the state vide letter dates 28 June 2006 for 'pengeluaran sisa-sisa kerja (waste) termasuk pasir, tanah, selut, batu karang, kulit-kulit siput dan lain-lain di dasar laut Pulau Songsong'. This was subject to various conditions. Payment of *Lesen Menumpang Sementara* were made and the licences were issued. The air force through its Operations Department and Procurement of Materials Section had no objection to the *pengeluaran sisa-sisa* vide letters dated 18 January 2007 and 19 January 2007.

[23] The defendant third witness (DW3-Azizah bt Mohd Khalid, MINDEF) was attached to Cawangan Aset since January 2005. Disposal of ammunition shells comes within her portfolio. It was her evidence that Shahidin had by letter dated 19 July 2005 (D32) applied for the registration of plaintiff as project management group and that MINDEF had by reply dated 22 July 2005 (D33) deferred the application pending clarification on certain issues. According to DW3 MINDEF had never approved plaintiff to do the works nor had it withdrawn the deferment. It is also her evidence that all contracts under MINDEF come within the purview of the finance division.

[24] The first defendant gave evidence as defendant fourth witness (DW4). It is his evidence that the approval of the state was only for disposal of waste materials which are the materials extracted alongside the ammunition shells. At para 15 of his witness statement (D34) he says:

15

S: Apakah hubungkait kenyataan di akhbar dan kebenaran pengeluaran pasir laut ini?

J: Kenyataan saya di akhbar ialah merujuk kepada pengeluaran pasir laut semata-mata. Pasir laut ini tidak dikeluarkan bersekali dengan kelongsong-kelongsong peluru. Maka jika dikeluarkan pasir sahaja, kegiatan ini bertentangan dengan kelulusan yang diberikan oleh Kerajaan Negeri.

[25] On his statement in *Utusan Malaysia Online* (P20) DW4 was aware that MINDEF had only approved the removal of ammunition shells and not sand dredging and he had been informed by the Deputy Secretary General (Operations), MINDEF. DW4 was also aware that it was Shahidin and not plaintiff that had the contract for removal of ammunition shells.

FINDING OF COURT ON JUSTIFICATION

[26] From the evidence it was Shahidin and not plaintiff that had the contract for removal of ammunition shells and the contract expired on 25 February 2007. Whatever plaintiff had was derived from the PMA which had not been approved by MINDEF. Clause 16.1 of Shahidin's contract with the government is clear there can be no subcontracting unless with the prior written approval of the government. Whatever approval given by the state and the various agencies to plaintiff was on the supposition that it had such contract and on that basis the approval for *pengeluaran sisa-sisa kerja* was given. This is evident from the letter written by plaintiff to the then acting Menteri Besar dated 26 November 2005 (P6) informing that it would be starting work on removing ammunition shells and referred to a contract reference number. A similar letter to the Land Office Yan dated 8 March 2007 (P7) was also written. Without such contract the approval may not have been forthcoming.

[27] Even if plaintiff had such a contract the PMA expired on 25 February 2006. Although Shahidin warranted to secure an extension of two years there was no evidence of such extension. On the assumption that plaintiff had a valid contract the approval given was only for removal of waste materials and not for sand dredging.

[28] The inference to be drawn is that plaintiff was on the island for the specified purpose of removal of waste materials. The further inference is that it was dredging sand as well as removing ammunition shells. This is evident from the agreement it had entered into on 20 Disember 2006 with Marinecore Sdn Bhd (P25). The scope of work includes the supply by plaintiff of approved marine sand. In the recital it is stated plaintiff claimed it had been given the right to extract sand or in the possession and free of encumbrances a sand source area located at Pulau Songsong. This would mean plaintiff needed sand for the purposes of supplying to Marinecore. This makes it probable it was already dredging sand and not PW1's evidence they were only doing a trial run to test equipment.

[29] In the light of the above defendants have proven their statements were true and have established justification.

THE DEFENDANTS' COUNTERCLAIM

[30] In submission the defendants' counsel conceded they had not proven their counterclaim.

CONCLUSION

[31] The plaintiff's case is dismissed with costs and defendants' counterclaim is dismissed.

Plaintiff's claim dismissed with costs and defendants' counterclaim dismissed.

Reported by Ashgar Ali Ali Mohamed